Supreme Court, U. S.
FILED
DEC 12 1977
MICHAEL RODAK, JR., CLERK

No. 77-840

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT NIEVES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EDWARD M. GENSON
JEFFREY B. STEINBACK
134 North LaSalle Street
Suite 300
Chicago, Illinois 60602
(312) 726-9015
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Question Presented 2

Constitutional Provision Involved 2

Statement of the Case 3

Statement of Facts 3

Reasons for Granting the Writ 9

1. The decision below conflicts with the decisions of other courts of appeals in permitting the Government to prove through tacit assumption alone an essential element of a criminal offense 9

2. The decision below raises significant and recurring problems concerning the Government's burden of proof in criminal cases which involve the possession or distribution of controlled substances 14

Conclusion 16

Appendix A—Opinion of the Court of Appeals for the Seventh Circuit dated June 23, 1977 App. 1

Appendix B—Order denying Petition for Rehearing and Suggestion for Rehearing En Banc dated November 10, 1977 .....App. 3

Appendix C—Motion Granted for Stay of Mandate Pending Application of Certiorari da'ed November 21, 1977 .....App. 4

AUTHORITIES CITED

Cases

	PAGE
Anderson v. United States, 417 U.S. 211 (1974)	15
Cook v. United States, 362 F.2d 548 (9 Cir., 1966)	9, 10
In Re Winship, 397 U.S. 358 (1970)	9, 15
People v. Leeman, 33 Ill.App.3d 461, 337 N.E.2d 231 (1975)	14
People v. Maurice, 31 Ill.2d 456, 202 N.E.2d 480 (1964)	14
People v. Scott, 22 Ill.App.3d 770, 317 N.E.2d 736 (1974)	13
People v. Resketo, 3 Ill.App.3d 633, 279 N.E.2d 432 (1972)	9, 11
United States v. Duncan, 539 F.2d 29, 31 (9 Cir., 1976)	15
United States v. Natelli, 527 F.2d 311, 329 (2 Cir., 1975)	14, 15
United States v. Suarez, 487 F.2d 236 (5 Cir., 1973)	9, 11

Other Authorities

Title 18, U.S.C., Sec. 201 (b)(3)	3
Title 21, U.S.C., Sec. 841 (a)(1)	3, 9
Title 21, U.S.C., Sec. 841 (a)(2)	11

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO.

ROBERT NIEVES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Robert Nieves, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The unpublished opinion of the Court of Appeals is appended to this Petition as Appendix A.

JURISDICTION

The opinion of the Court of Appeals was entered (as an unpublished order per Seventh Circuit Rule 35) on July 23, 1977. More than four months later, Petitioner's petition for rehearing and suggestions for rehearing *en banc,* timely filed, was denied on November 10, 1977, pursuant to an order which is appended to this petition as Appendix B.[1] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

QUESTION PRESENTED

Whether the decision of the Court of Appeals, in condoning the incompetence of Government counsel through affirmance for failure to offer evidence as to an essential element of a criminal offense, ignored Petitioner's due process rights and thereby established a dangerous precedent, conflicting in principle with the law of other jurisdictions?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law; . . ."

---

[1] Thereafter, on November 17, 1977, Petitioner moved the Seventh Circuit for a stay of the mandate pending application for certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure and Seventh Circuit Rule 17, requiring that the movant make a showing of probable cause to believe that a Petition for Certiorari will not be frivolous or filed merely for delay. On November 21, 1977, the Seventh Circuit entered an order, so staying the mandate. This order is appended hereto as Appendix C.

STATEMENT OF THE CASE

Petitioner, Robert Nieves, was charged, together with three co-defendants, in Count Five of a six-count indictment, with the unlawful distribution of heroin, in violation of Title 21, U.S.C., Sec. 841(a)(1). In addition, Petitioner Nieves alone was charged in Count Six of the aforesaid indictment with bribery, in violation of Title 18, U.S.C., Sec. 201(b)(3).

At the trial of this cause, Petitioner Nieves' three co-defendants entered guilty pleas to various counts under which they were charged. In contrast, Petitioner elected to be tried, by bench, for the alleged offenses, as aforesaid, at the conclusion of which the trial court entered a finding of guilty on both Counts Five and Six. Thereafter, Petitioner Nieves received sentence, together with the three co-defendants. As to Count Five of the indictment, Petitioner Nieves was committed to the custody of the Attorney General for a period of five years with a three-year special parole term to follow. As to Count Six, imposition of sentence was suspended, Petitioner Nieves being placed on probation for a period of one year to run consecutively with the three-year special parole term imposed in Count Five.

STATEMENT OF FACTS

Initially, it should be noted that Petitioner raises no issue with respect to Count Six of the instant indictment, charging the offense of bribery. Only Count Five, charging the unlawful distribution of heroin is at issue herein. Accordingly, evidence which relates exclusively to Count Six will be omitted from reference in this factual summary. Philip Cline, called first as a witness on behalf of the Government, testified that at 2:00 P.M. on the afternoon of February 25, 1976, he was employed as a task

force agent for the Drug Enforcement Administration, operating "under cover" to arrange for the purchase of a quantity of heroin from one Wilfredo Valle, a co-defendant below (R. 14).

According to Agent Cline, he and Valle arranged to meet at the Lake Forest Oasis on Interstate 294 of the Illinois Toll Road (R. 18). The meeting, as scheduled, was to take place between 3:00 and 3:30 P.M. that same afternoon (R. 18).

At approximately 3:00 P.M., Agent Cline stated that he arrived at the designated Oasis, parking in a southbound direction to obtain a view of oncoming traffic (R. 20). Upon arrival, Cline stated that he exited his vehicle and met with other drug enforcement administration agents in the Oasis restaurant, among whom was Agent Duckhorn (R. 21).

Approximately one hour after his arrival, Cline stated that he observed a yellow van driven by co-defendant Valle and occupied by two other persons, proceeding toward the same Oasis parking lot in which Cline had parked his vehicle (R. 23). The van parked next to Cline's vehicle (R. 23). In addition, Cline testified that he observed a white Cadillac follow closely behind the van, proceeding along the same path to the parking lot, and parking nearby (R. 24).

Cline later learned that the two other occupants in the van with Valle were co-defendants Harry Hernandez and Moses Diaz, testifying to that effect (R. 23). Cline initially testified that he "couldn't tell who was driving the Cadillac" (R. 23). Cline thereafter stated that he learned that Petitioner Robert Nieves, Justino Nieves, Deborah Richardson and Susan Negron were all occupants of this Cadillac (R. 31).

Cline continued that Valle exited the van, entering the back seat of Cline's vehicle (R. 23). Cline stated that he

inquired of Valle as to whether he had the "20 ounces" (R. 23). According to Cline, Valle responded in the affirmative but insisted first on counting the purchase money (R. 24). Cline stated that he tendered to Valle $14,000 in officially advanced and prerecorded funds (R. 24). At that time, Cline testified that Valle counted this money, returned it to Cline and exited Cline's vehicle, intending to "get back" to him (R. 24).

Cline further stated that Valle returned to his van, therein briefly conversing with co-defendant Diaz and co-defendant Hernandez (R. 26). Cline stated that he observed Petitioner Nieves exit the white Cadillac, meet with Valle outside and walk to the trunk of the Cadillac (R. 27). At this point, the trunk of the Cadillac was opened for a short period of time and then closed (R. 28). Thereafter, Cline testified that he observed Valle holding a brown paper bag in his hand (R. 26).

According to Cline, Valle then left Petitioner Nieves and walk to Cline's vehicle, being joined by co-defendant Diaz (R. 28). Cline testified that Valle entered Cline's vehicle and handed a brown paper bag to him (R. 28). Cline stated that he examined the contents of the bag, observing "several plastic bags which contained a brown chunky substance" (R. 29). Cline stated that he inquired of Valle as to whether the "substance" was "good stuff" to which Valle responded "it's real good stuff" (R. 28, 29).

At this point, Cline testified that he issued a prearranged signal to Agent Duckhorn and others for arrest, that he tendered the official funds to Valle, who, in turn, handed them to Diaz and that he and Agent Duckhorn announced that they were police officers (R. 29, 30). Both Valle and Diaz attempted to flee, but were apprehended after a very brief chase and placed under arrest (R. 29,

30). The officially advanced funds were recovered from Diaz (R. 29).

Contemporaneously, Cline testified that co-defendant Hernandez, Justino Nieves and Deborah Richardson were apprehended and taken into custody on the scene (R. 30, 31). However, Petitioner Nieves and Susan Negron were not apprehended until approximately 40 minutes later at a location approximately one-fourth (¼) mile west of the Oasis, apparently fleeing that location during the fracas (R. 33).

The witness John R. Duckhorn, called to testify on behalf of the Government, stated that on the afternoon of February 25, 1976, he was employed as a task force agent for the Drug Enforcement Administration, also operating "under cover" to effectuate the arrest of the co-defendants herein for the allegedly unlawful distribution of a quantity of what was purported to be heroin (R. 81).

In this regard, Agent Duckhorn testified that he appropriated a fourteen thousand dollar ($14,000) "flash roll" intended for use in the anticipated purchase of the purported heroin from co-defendant Valle (R. 83).

Duckhorn testified that in the afternoon of February 25, 1976, he drove an unmarked Government vehicle to the Lake Forest Oasis, therein meeting Agent Cline to discuss the anticipated purchase (R. 84). According to Duckhorn, he and Agent Cline awaited the arrival of Defendant Valle while in Agent Cline's vehicle, ultimately resulting in the arrest of Petitioner Nieves (R. 86).

Beyond the foregoing summary of facts related to the testimony of Agent Cline, Agent Duckhorn added in his testimony that, to his knowledge, Petitioner Nieves never physically possessed the brown paper bag containing the purported heroin (R. 102).

Lastly, the Government and the Defendant entered into a stipulation in which something referred to as Government Group Exhibit No. 7 was received by the Drug Enforcement Administration Laboratory in Chicago, Illinois, and certain experiments were performed thereon, resulting in the conclusion that the substance found therein was a mixture containing heroin. The contents of the stipulation read as follows:

> 1. That if Richard Chaklos was called as a witness, he would testify as follows:
>
> (a) That he had been employed by the Drug Enforcement Administration as a forensic chemist for approximately 3½ years and has been a forensic chemist for approximately 4½ years.
>
> (b) That he is qualified to perform quantitative and qualitative analysis of unknown substances and thereby determine their identity.
>
> (c) He has performed 500 analyses of substances which he was correctly able to identify as being heroin.
>
> (d) That on February 27, 1976, Government Group Exhibit 7 was received by the Drug Enforcement Administration Laboratory in Chicago, Illinois, from task force Agent Phil Klein of the Drug Enforcement Administration; and thereafter this exhibit was placed in the Drug Enforcement Administration laboratory evidence vault.
>
> (e) Chemist Chaklos, thereafter on or about March 25, 1976, had occasion to remove Government Group Exhibit 7 from the evidence vault and perform quantitative and qualitative experiments upon a substance contained in the exhibit.
>
> (f) That as a result of his analysis and experience in analyzing heroin, he was able to conclude that the substance contained in Group Exhibit 7 was a mixture containing heroin weighing a total of 466.72 grams . . .

(g) That further, he, Richard Chaklos, during the course of his analysis, maintained sole custody and control of Government Group Exhibit 7 and upon completion of his analyses of Government Group Exhibit 7 placed the brown powdery substance contained in Government Group Exhibit 7 back into a substitute clear plastic bag that he dated, numbered with the case number and initialed. He then lock sealed the bag containing Government Group Exhibit 7, initialed and dated it and placed said item in the evidence vault and the DEA laboratory where it remains.

Government Group Exhibit 7 was never identified by any witness at the trial, offered by any party at the trial or received into evidence by the trial court. In fact, at no time did the Government bring Government Group Exhibit 7 into the courtroom.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of other courts of appeals in permitting the Government to prove through tacit assumption alone an essential element of a criminal offense.

This Court confirmed, if it was ever doubted, that the Government's burden to prove each and every element of a criminal charge beyond a reasonable doubt is of constitutional dimension. *In Re Winship,* 397 U.S. 358 (1970). In so holding, the *Winship* Court pointed out the Constitutional basis for its decision, explaining:

> The due process clause protects the accused against conviction set upon proof beyond a reasonable doubt of every material fact to constitute the crime with which he was charged. *Id.* at 365.

Fundamentally, under the language of the statute, to be convicted for a violation of Title 21, U.S.C., Sec. 841 (a)(1), an accused must, in fact, either "manufacture, distribute or dispense . . . a controlled substance." In the case below, Petitioner Nieves was charged with and ultimately convicted for the unlawful distribution of a substance alleged to be heroin. Yet, the only references at trial to any alleged heroin were a "brown paper bag" and a "brown chunky substance." Such scant references fall far short of proving that Petitioner, in fact, distributed the Schedule One narcotic drug *heroin.* See *Cook* v. *United States,* 362 F.2d 548 (9 Cir., 1966); *United States* v. *Suarez,* 487 F.2d 236 (5 Cir., 1973); see also *People* v. *Resketo,* 3 Ill.App.3d 633, 279 N.E.2d 432 (1972). More importantly, the Government failed even to physically bring into the courtroom any alleged substance containing heroin, much less have it identified, offered or received

into evidence at trial. Nonetheless, in disregard for the applicable law, the Seventh Circuit has here held that an accused may be convicted of the unlawful distribution of heroin despite the fact that the Government fails to offer any evidence that the substance allegedly distributed by Petitioner was, in fact, heroin. In so holding, the Seventh Circuit established a dangerous precedent, permitting the Government to prove by tacit assumption alone an essential element of an offense. This holding squarely conflicts with the principles of due process established by this Court and applied, under nearly identical circumstances, in the Ninth Circuit decision of *Cook* v. *United States,* 362 F.2d 548 (1966).

In *Cook,* the Ninth Circuit overturned defendants' convictions to violate narcotics statutes, holding that there was a failure on the part of the Government to prove that "38 spoons" of alleged cocaine, "three ounces" and other portions of white powder offered into evidence were in fact narcotic drugs. The Ninth Circuit in *Cook* was unimpressed with evidence showing that the defendants therein handled these powders "with the secrecy and deviousness with which it would be expected to use in handling contraband narcotic drugs," that "higher prices were bid for them," or that "in dealing among themselves, parties who possessed and handled these powders referred to them as narcotic drugs." Likewise in the decision below, while there may have been an element of secrecy or deviousness in the handling of the suspected substances, this may not, of itself, prove beyond a reasonable doubt that such substances do, in fact, contain heroin.

Further, the evidence against the *Cook* defendants was even stronger than that against Petitioner herein. While in *Cook,* the Government at least possessed the good sense actually to introduce a white powdery substance alleged to be cocaine into evidence at trial, at the trial below, the

Government failed even to bring the brown powdery substance alleged to be heroin into the courtroom.[2]

Consistent with the Ninth Circuit decision in *Cook* is the Fifth Circuit decision in *United States* v. *Suarez,* 487 F.2d 236 (1973), holding that mere proof of defendant's actions in going to and from the home of a known narcotics dealer while carrying a bag was insufficient to support his conviction for the possession and distribution of heroin. Similarly, here, the evidence demonstrated only that one of Petitioner's co-defendants Valle, distributed a "brown paper bag" to the arresting agent.[3]

Additionally instructive on the issue presented herein are the decisions of the appellate courts in Illinois. *People* v. *Resketo,* 3 Ill.App.3d 633, 279 N.E.2d 432 (1972), held that there was no evidence that the suspected substance was a narcotic where there was no proof as to whom a vial allegedly containing the substance was delivered at the crime lab and no evidence of its condition when it was delivered. The *Resketo* Court, in requiring a positive identification to demonstrate that the suspected material was actually a proscribed narcotic stated:

> Applying this established principle to the case at bar, it appears immediately that there is a complete

---

[2] Notably, it is not uncommon to find distribution schemes in which sugar, flour or some other innocuous substance is sold in lieu of a true narcotic in an attempt to "rip off" the prospective purchaser. In fact, Title 21, U.S.C., Sec. 841(a)(2), proscribing the unlawful distribution of a counterfeit substance, was specifically enacted to reach such schemes. Accordingly, to the extent such conduct on the part of Petitioner Nieves may be demonstrated, it nonetheless does not prove that the substance distributed was, in fact, the controlled substance, heroin.

[3] Significantly, it was established by the very testimony of the arresting agents that Petitioner Nieves never even physically possessed a brown paper bag containing the alleged heroin.

lack of proof that the substance found by the arresting officer was actually the same material which was subjected to chemical tests.

* * *

In addition, . . . there is no evidence that the test in question was made upon the material seized by the arresting officer . . . if the stated number is intended to represent a serial number designation of the report, the lack of evidence would be even more apparent because there is no connecting link of any kind between this number and the substance seized in the arrest.

Likewise, in the decision below, the Government failed to demonstrate any connecting link between something referred to as Government Group Exhibit 7 [4] and the sub-

[4] In affirming the conviction of Petitioner, the Seventh Circuit entered the following findings:

> At the beginning of the bench trial, a stipulation signed by all parties was tendered to the District Court. That stipulation refers to Government Group Exhibit 7, which the stipulation describes as a brown powdery substance. The stipulation further indicates that two days after DEA Agent received the brown powdery substance from defendant's co-defendant at the time of arrest, the agent took the substance to the lab for analysis, which later indicated a mixture containing cocaine. See page 1 of Appendix A hereto.

Careful evaluation of the actual contents of the subject stipulation reveal that the findings of the Seventh Circuit are materially erroneous in the following respects:

(a) Nowhere in the subject stipulation does it state that the brown powdery substance analyzed therein was received "from defendant's co-defendant at the time of arrest." In fact, the stipulation in paragraph (d) states that the substance was received from one "task force agent Phil Cline", not from any co-defendant of Petitioner Nieves.

(b) The stipulation is silent as to when the substance analyzed therein was seized. In fact, the stipulation states only that

(footnote continued)

stance seized from co-defendant Valle at the time of his arrest.

People v. *Scott*, 22 Ill.App.3d 770, 317 N.E.2d 736 (1974), held that the prosecution has the affirmative burden of proving not only the fact of possession but also that the substance possessed was in fact a narcotic or dangerous drug, stating:

> The mere fact that the number under which the officer gave the substances to the crime lab is the same as the number on the lab report written by a police chemist showing that a certain substance to be examined are proscribed drugs *is weak evidence*

(footnote continued)

> *a* substance was received on February 27, 1976. Contrary to the findings of the Seventh Circuit, the stipulation does not reflect that the substance analyzed was seized at the time of Petitioner's arrest.
>
> (c) The stipulation absolutely is devoid of any evidence as to how the substance analyzed therein and labeled Exhibit No. 7 relates to the offense for which Petitioner was tried.
>
> (d) Assuming, for the sake of argument, the proposition that this exhibit constitutes the same substance seized on February 25, 1976, from co-defendant Valle, for which there is no evidence, according to paragraph 1(d) of the aforesaid stipulation, there remains a two-day gap from the time of its seizure to the time at which it was received, February 27, 1976, by the Drug Enforcement Administration lab. In fact, the Government's proof at trial suggests a significant break in the "chain" in that there was no testimony concerning the handling or storage of these items subsequent to their seizure on the afternoon of February 25, 1976 until the time of trial on November 29, 1976.
>
> (e) Most importantly, Exhibit 7 was never even in the courtroom, much less identified, offered or received into evidence at trial.

at best of the identity of the substance taken from the defendant. (emphasis added) [5]

These conflicts justify the grant of certiorari to review the judgment below.

2. The decision below raises significant and recurring problems concerning the Government's burden of proof in criminal cases which involve the possession or distribution of controlled substances.

The Seventh Circuit's opinion in this case reflects a growing apathy towards the constitutional rights of the criminally accused. In light of the tremendous volume of criminal prosecutions regarding the possession or distribution of controlled substances, there are compelling reasons why this Court should consider the dangerous precedent established by the Seventh Circuit's opinion, permitting the Government to prove by tacit assumption alone an essential element of a criminal offense. Among the more salient problems which emerge from such a holding are:

(1) Should the shortcomings of Government counsel to prove each and every element of a criminal offense be available as a defense for the Government on appeal?

At trial, the Government failed even to bring into the courtroom the alleged heroin, much less have it identified, offered or received into evidence, disregarding its obligation to positively identify and affirmatively demonstrate that the substance that was distributed was, in fact, heroin. The Government therefore failed to offer any evidence as to an essential element of the offense at trial. For a

[5] See also *People* v. *Leeman,* 33 Ill.App.3d 461, 337 N.E.2d 231 (1975); *People* v. *Maurice,* 31 Ill. 2d 456, 202 N.E.2d 480 (1964).

reviewing court to permit the Government to prove tacitly an essential element of a case is tantamount to countenancing incompetent Government counsel. Quite simply, federal district courts should not be burdened by the Government's failure to prove their case properly and, certainly, incompetent Government counsel should not be a defense for the Government on appeal.

(2) Is the defense of waiver available to the Government on appeal to justify the informal treatment of an essential element of a criminal offense?

On appeal below, the Government advocated the theory of waiver as a justification for its informal treatment of the identification of heroin so central to the disposition of the case. The Seventh Circuit in its opinion accepted this theory as justification therefor. See page 2 of Appendix A hereto. However, since absolutely no evidence with respect to the alleged heroin was ever identified, offered or received into evidence at trial, there was nothing to which Petitioner's trial counsel could object. Accordingly, the theory of waiver advocated by the Government and accepted by the Seventh Circuit is inapposite. Simply put, since there was nothing to which to object, there could be no waiver of any objection.

Further, a reviewing court, in its discretion, may always consider a "sufficiency-of-the-evidence claim." Cf. *Anderson* v. *United States,* 417 U.S. 211 (1974); *United States* v. *Natelli,* 527 F.2d 311, 329 (2 Cir., 1975). Moreover, the Government surely may not be permitted to forego proof as to an essential element of an offense in derogation of its burden of proof. See *United States* v. *Duncan,* 539 F.2d 29, 31 (9 Cir., 1976); see, generally, *In Re Winship,* 397 U.S. 358 (1970).

In sum, the refusal of the Seventh Circuit to respect the Constitutional rights of Petitioner to be convicted only

on proof beyond a reasonable doubt as to each and every element of an offense and the apparent placement of its imprimatur on incompetent Government counsel as an available defense to the Government on appeal cannot be justified.

CONCLUSION

For any and all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

EDWARD M. GENSON
JEFFREY B. STEINBACK
Attorneys for Petitioner.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued June 16, 1977
June 23, 1977.

Before
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge*•

UNITED STATES OF AMERICA,
Plaintiff-Appellee

No. 77-1075 vs.

ROBERTO NIEVES,
Defendant-Appellant

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division,
NO. 76-CR-246
JOHN POWERS CROWLEY, *Judge.*

ORDER

The sole contention raised by defendant-appellant is that there was insufficient evidence to convict him of the crime of distribution of heroin. In particular, defendant has argued that the brown chunky substance contained in a brown paper bag which the evidence showed he distributed was never sufficiently identified as the same substance an-

---

• The Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

alyzed and found to contain heroin. As expressed by the members of the panel during oral argument, we reject this contention and affirm defendant's conviction.

At the beginning of the bench trial, a stipulation signed by all parties was tendered to the district court. That stipulation refers to Government Group Exhibit 7, which the stipulation describes as a brown powdery substance. The stipulation further indicates that two days after a DEA agent received the brown powdery substance from defendant's co-defendant at the time of arrest, the agent took the substance to the lab for analysis, which later indicated a mixture containing heroin.

The brown powdery substance itself was never in the courtroom or identified by any witness, but there was no issue at trial as to this brown substance. Our review of the record indicates that all parties and the district court understood Exhibit 7 to be the brown powdery substance distributed by NIEVES and his co-defendant. Furthermore, at trial, defendant's defense was lack of involvement in the transaction. In light of this defense, the prosecution and the trial court treated the identification of the heroin informally. This informal treatment was never objected to during trial. As such, any issue now raised by defendant as to Exhibit 7's presence, lack of foundation or identification is waived.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
November 10, 1977

Before
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *District Judge* •

UNITED STATES OF AMERICA,
Plaintiff-Appellee

No. 77-1075 vs.

ROBERT NIEVES,
Defendant-Appellant

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division,
NO. 76-CR-246
JOHN POWERS CROWLEY, *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

• Hon. William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
November 21, 1977.

Before
Hon. WILLIAM J. CAMPBELL, *Senior District Judge* *

UNITED STATES OF AMERICA,
Plaintiff-Appellee

No. 77-1075 vs.

ROBERT NIEVES,
Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division,
NO. 76-CR-246
JUDGE CROWLEY

This matter comes before the court on the "MOTION FOR STAY OF MANDATE PENDING APPLICATION OF CERTIORARI" filed herein on November 17, 1977 by counsel for the defendant-appellant. On consideration whereof,

IT IS ORDERED that the mandate of this court be, and it is hereby, STAYED *only to and including December 19, 1977,* in accordance with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

---

* The Honorable William J. Campbell, Senior District Judge for the Northern District of Indiana, Eastern Division, is sitting by designation.